DATUK (DATU) AMIR KAHAR BIN TUN HAJI MUSTAPHA

v.

TUN MOHD SAID BIN KERUAK (YANG DI-PERTUA NEGERI SABAH) & 8 ORS.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DATO' HJ. ABDUL KADIR BIN SULAIMAN J.
[ORIGINATING SUMMONS NO. K 24-63 OF 1994]
10 OCTOBER 1994

PRACTICE & PROCEDURE: Defendants' application to strike out plaintiff's originating summons - Defendants' affidavit in support of application making reference to affidavits in reply filed in relation to main action - Whether defendants' affidavit defective in the light of the nature of the affidavit in support - Defendants' application to strike out filed after date fixed for hearing of originating summons - Whether defendants' application ought not to be allowed on the grounds that the defendants had taken further steps in the proceedings by filing affidavits in opposition to the claim.

CONSTITUTIONAL LAW: Resignation of Chief Minister of the State of Sabah - Whether also includes the resignation of the members of his Cabinet - Whether resignation only personal to the Chief Minister - Consideration of Article 7 of the Sabah State Constitution - Appointment of new Chief Minister and Cabinet - Whether justiciable - State Constitution granting discretion to Yang Di-Pertua Negeri - Whether discretion unfettered - Whether Court has jurisdiction to enquire whether conditions precedent to exercise of discretion fulfilled - Resignation of Chief Minister deemed to be resignation of Cabinet based on established constitutional convention - Whether convention can override express provisions of Constitution - Application to strike out plaintiff's originating summons for declarations - Whether plaintiff has a reasonable cause of action - Whether plaintiff's pleading scandalous, frivolous, vexatious or otherwise an abuse of the process of the Court - Whether plain and obvious case for striking out pleading summarily.

The plaintiff filed an originating summons praying for various declarations arising out of the resignation of Datuk Joseph Pairin Kitingan (Pairin) as Chief Minister of Sabah. The plaintiff challenges the appointment of the new Cabinet of the State of Sabah as being unconstitutional, *ultra vires* and invalid when he and the other members of Pairin's Cabinet had not tendered their resignation nor had their appointments revoked by the first defendant.

The defendants filed various affidavits in opposition to the plaintiff's originating summons and subsequently made an application to strike out the originating summons under O. 18 r. 19 of the Rules of the High Court 1980 (RHC 1980). The affidavit in support of the application to strike out merely referred to the affidavits in reply filed to the plaintiff's main application and the plaintiff contended that the application to strike out was defective in the light of the nature of the affidavit in support.

The plaintiff further contended that as the defendants had taken further steps in the proceedings by filing a number of affidavits in opposition to the claim, the application to strike out ought not to be allowed. Learned Counsel for the plaintiff relied on the fact

that the application was filed after the Court had fixed the date for the hearing of the originating summons to support his contention that the defendants' application should not be entertained. In support of his argument learned Counsel relied on the case of *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman And Another Action* (*Bank Bumiputra's* case).

The learned Senior Federal Counsel (SFC) on behalf of the defendants, in support of the application to strike out, questioned the jurisdiction of the Court to hear the originating summons of the plaintiff, it being contended that the said summons was in respect of matters which are non-justiciable. The learned SFC relied on Article 164(1) of the Indian Constitution and argued that as the Ministers in the Cabinet hold office at the pleasure of the first defendant, the first defendant by exercising his discretion to appoint the other defendants to the Cabinet was in fact withdrawing his pleasure upon the plaintiff.

The learned SFC further argued that the resignation of Pairin must be deemed to be the resignation of the Cabinet under established constitutional convention and further submitted that the appointment of the third to the ninth defendants as Ministers means in law and in fact the dismissal of the plaintiff as a Minister.

Held:

[1] Order 18 r. 19 of the RHC 1980 merely requires an application to be made. There is no requirement in the rule for an affidavit accompanying the application. In the absence of any express requirement for an affidavit to support the application under O. 18 r. 19, the affidavit in support is not mandatory. In the circumstances, the affidavit of Wong Kian Kheong in support of the application of the defendant, to strike out the plaintiff's pleading, is of no consequence or significance.

[2] In any event, according to O. 41 r. 5(2) of the RHC 1980, an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. In that light the affidavit of Wong Kian Kheong is not defective because after a reference to the earlier affidavits he deposed that based on the aforesaid affidavits he verily believes that the originating summons of the plaintiff discloses no reasonable cause of action against all or any of the defendants and/or is scandalous, frivolous, vexatious and/or is an abuse of the process of the Court. In the circumstances the plaintiff's objection that the defendants' affidavit was defective has no merit.

[3] In regard to a writ action the position is clear that notwithstanding the provisions of O. 18 r. 19, which allows an application to strike out the pleading to be made at any stage of the proceedings, such an application must be refused after the action has been set down for trial (*Bank Bumiputra's* case). In this case the Notice of Appointment to Hear Originating Summons was sealed towards the end of June 1994 and the Court fixed the date of hearing to be on 6 & 7 July 1994. Thus if the rigid rule in *Bank Bumiputra's* case were to be applied, there would not be any room for the defendants to file this application. As the matter was further aggravated by the substantial amendment made to the originating summons which necessitated further instructions from the second defendant, the filing of the application by the defendants, after the action had been fixed for hearing, was not fatal to them.

[4] In considering the matters contained in the application of the plaintiff as a whole, those matters involved various aspects not all of which concerned the issue of questioning the exercise of the discretion of the first defendant. Before any such discretion is to be exercised by the person so given, if the statute or Constitution imposes conditions to be satisfied before the exercise of such discretion, only the fulfilling of those conditions would clothe the person given the jurisdiction the right to exercise the discretion. In the circumstances the Court will not be without jurisdiction to consider whether the requisite conditions have been fulfilled. Just because the first defendant has a certain discretion to exercise, it does not mean that *ipso facto* the jurisdiction of the Court in ousted.

[5] On the defendants argument on Article 164(1) of the Indian Constitution, Article 164(1) is not in *pari materia* with Article 7(3) of the Sabah Constitution. The exercise of pleasure by the first defendant under Article 7(3) is fettered with conditions and restrictions. In the circumstances the Court has the jurisdiction to enquire whether, if the first defendant has so exercised his discretion upon the plaintiff, he had done so subject to the fulfilment of the conditions in clauses (1) and (2) of the said Article.

[6] In this case what we have is the fact that the Chief Minister resigned and the plaintiff's appointment was never revoked by the first defendant. The issue therefore revolves around the interpretation to be given by the Court to the various relevant provisions of the Sabah Constitution, particularly Articles 6 and 7 thereof, which issue is clearly within the jurisdiction of the Court. In the circumstances the matter is not that plain and obvious to invoke the discretion of the Court to strike out the plaintiff's originating summons summarily.

[7] The question whether Pairin resigned under Article 7(1) or 7(2) of the Sabah Constitution is an issue to be tried as he can only be said to have resigned under Article 7(1) if it is established that Pairin resigned on account of his ceasing to command the confidence of the majority, which question, according to the plaintiff, can be resolved only by a motion tabled in the Assembly. The learned SFC's contention that Pairin cannot resign under clause (2) of Article 7 was without merit as the language of the clause is clear that it includes a Chief Minister as a member of the Cabinet when dealing with resignation.

[8] Constitutional convention comes in aid of the construction of the constitutional provisions. However a convention cannot override the express provisions of the Constitution. Therefore before a convention is invoked, the constitutional provision needs to be looked at and one cannot simply look at the convention and brush aside the constitutional provision.

[9] On the argument that the appointment of the third to the ninth defendants as Ministers means in law and in fact the dismissal of the plaintiff as a Minister, this involves arguments as to the interpretation to be given to Article 7 of the Constitution as to whether, in the absence of the resignation by members of the Cabinet and in the absence of the revocation of their appointments and in the absence of a clear reason for Pairin to resign, the said resignation is one under Article 7(1) thereof. If the resignation of Pairin was under clause (2) of Article 7, it cannot be concluded that such resignation

would result in the automatic loss of office of the members of Pairin's Cabinet simply on account of the appointment of the third to the ninth defendants into the Cabinet of the second defendant. The pleading of the plaintiff has disclosed various issues to be tried and in the circumstances the application of the defendants under ground (a) of O. 18 r. 19(1) RHC 1980 must necessarily fail.

[10] It is to be noted that the letter of resignation is in respect of Pairin as the Chief Minister. It is not a letter of resignation of the members of his Cabinet as provided for under Article 7(1) of the Constitution. The Constitution uses the phrase "to command the confidence of a majority of the members of" the Assembly both in Articles 6 and 7. In the context of Article 7 and in the light of the resignation letter, there is a triable issue as to how the fact of "ceases to command the confidence of a majority" is to be determined.

[11] Although the defendants have produced a press statement issued by Pairin after tendering his letter of resignation, subject to certain exceptions, a written statement cannot be allowed to be varied or contradicted by an oral or other written statement. To that extent it cannot be said that the originating summons of the plaintiff is scandalous, frivolous or vexatious or is an abuse of the process of the Court.

[12] An action for a declaration involves two stages. The first is that the plaintiff must persuade the Court that he has the right. Only if he succeeds will the second stage, the remedy stage, come into operation. In the circumstances it is premature to consider the defendants' argument that the exercise embarked upon by the plaintiff is futile and academic and that the plaintiff should not be given the remedy he seeks to avoid repercussions.

[13] The originating summons of the plaintiff has raised several issues of law and facts which calls for a full trial of the action. This is not a plain and obvious case where the Court ought to strike out the pleading summarily. The plaintiff has a reasonable cause of action on the pleading which is in no way scandalous, frivolous or vexatious or otherwise an abuse of the process of the Court.

[Defendants' application to strike out plaintiff's originating summons dismissed with costs].

Cases referred to:
Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman & Another Action [1987] 2 MLJ 633, [1987] CLJ 572 ***(dist)***
Jamir Hassan v. Kang Min [1992] 2 MLJ 46 ***(dist)***
Tun Datu Haji Mustapha bin Datu Harun v. Tun Datuk Haji Mohamed Adnan Robert (No. 2) [1986] 2 MLJ 420 ***(foll)***
Mahabir Prasad v. Prafulla Chandra AIR 1969 Calcutta 198 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 2(1), O. 18 r. 19(1)(a), (b), (d), (3), O. 29 r. 1(2), O. 32 r. 1, O. 41 r. 5(2), O. 49 r. 2, O. 50 r. 3, O. 81 r. 2(1)
Sabah Constitution, Articles 6, 7(1), (2), (3), 10(2)(b)
Indian Constitution, Article 164(1), (2)

Other sources referred to:
Supreme Court Practice 1988, p. 313

For the plaintiff - Y.M. Raja Aziz Addruse (Yunof E. Maringking with him); M/s. Maringking & Co.
For the 1st, 2nd and 4th to 9th defendants - Abdul Ghani Patail, SFC (K.K. Wong, FC & Halimah Nawab Khan with him)
For the 3rd defendant - Lawrence Chong; M/s. Yong & Chia and Sukumaran; M/s. J. Ambrose & Co.

JUDGMENT

Hj. Abdul Kadir bin Sulaiman J:

This is the defendants' application by summons in chambers to strike out the plaintiff's originating summons praying for various declarations arising out of the resignation of Datuk Joseph Pairin Kitingan (Pairin) on 17 March 1994 as Chief Minister of Sabah and the appointments by the 1st defendant of the 2nd defendant as the new Chief Minister and the 3rd to the 9th defendants as members of the new Cabinet on the advice of the Chief Minister. The plaintiff challenges the appointment of this new Cabinet as being unconstitutional, *ultra vires* and invalid when he and the other members of Pairin's Cabinet had not tendered their resignation or that their appointments being revoked by the 1st defendant.

The defendants' application is under O. 18 r. 19(1)(a), (b) and (d) of the Rules of the High Court 1980 (the RHC) and under the inherent jurisdiction of the Court. The application is supported by the affidavit of Wong Kian Kheong affirmed on 7 September 1994. The said affidavit merely refers to various affidavits in reply of the defendants filed as replies to the plaintiff's main application in the originating summons. Based on those affidavits in reply, the deponent verily believes that the originating summons of the plaintiff discloses no reasonable cause of action against all or any of the defendants, and/or is scandalous, frivolous, vexatious and/or is an abuse of the process of the Court. In opposition to this application of the defendants, the plaintiff filed an affidavit in opposition affirmed on 22 September 1994. In the affidavit in opposition of the plaintiff he questioned the propriety of those affidavits in reply referred to by the deponent of the affidavit in support of this application, since those affidavits are meant for the trial/ hearing of the originating summons which had been fixed for hearing. So, the immediate issue which calls for a decision is whether the application of the defendants is defective in the light of the nature of the affidavit in support. This application of the defendants is made by way of a summons in chambers pursuant to O. 32 r. 1 of the RHC. According to Form 62, the applicant is required to state the grounds of the application. In this case the grounds are therein stated as being that the originating summons discloses no reasonable cause of action against all or any of the defendants, which is ground (a) of r. 19(1). The other ground is that it is scandalous, frivolous or vexatious, which is ground (b) of r. 19(1) and finally that it is an abuse of the process of the Court which is ground (d) of r. 19(1) of O. 18 of the RHC. Order 18 r. 19 does not spell out the requirement of any affidavit in support of the application. This is different from an application made under O. 14 where by r. 2(1) thereof the applicaton must be made by summons supported by an affidavit. Similarly with an application under O. 81 where by r. 2(1) thereof an affidavit is required for the application. Again, an application under O. 49 r. 2 is required to be supported by an affidavit. Similarly with an application under O. 50 r. 3 where the

application must be supported by an affidavit. To cite yet another form of application is an application under O. 29 r. 1(2) of the RHC where it must be supported by an affidavit. Whereas under O. 18 r. 19, it merely requires an application to be made. There is no requirement in the rule for an affidavit accompanying the application. An application by summons in chambers is no doubt an interlocutory proceeding and O. 41 r. 5(2) makes mention of an affidavit sworn for the purpose of being used in interlocutory proceedings. But in the absence of any express requirement of an affidavit to support the application in O. 18 r. 19, it is my view that for an application under the rule the affidavit in support of the application is not mandatory. In the circumstances, the affidavit of Wong Kian Kheong in support of this application of the defendant is of no consequence or significance. In any event, if I am wrong in holding that an affidavit is not a prerequisite for an application under O. 18 r. 19, then according to O. 41 r. 5(2), an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. In that light the affidavit of Wong Kian Kheong in this case is not defective because after a reference to those affidavits, he deposed that based on the aforesaid affidavits he verily believes that the originating summons of the plaintiff discloses no reasonable cause of action against all or any of the defendants and/or is scandalous, frivolous, vexatious and/or is an abuse of the process of Court. According to the **Supreme Court Practice 1988** at page 313, the application should specify precisely what order is being sought. In this case, the application specifies that the order sought is for the plaintiff's originating summons dated 20 May 1994 be struck out under O. 18 r. 19(1) and (3) of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the High Court based on the grounds listed therein which is as stipulated under O. 18 r. 19(1)(a),(b) and (d) of the RHC. By the application, the defendants pray for the striking out of the whole pleading in the originating summons. In the circumstances, the plaintiff's objection has no merit.

Next, the plaintiff by his affidavit opposes the application of the defendants on the ground that since the commencement of the action by him, the defendants have filed a number of affidavits in opposition to his claim. Having taken these further steps in the proceedings, the defendant's application ought not to be allowed. In his submission, the learned Counsel for the plaintiff says that the application should not be entertained because this application of the plaintiff was filed after the Court had fixed the date of hearing of the plaintiff's originating summons. On the authority of *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman & Another Action* [1987] 2 MLJ 633 cited in *Jamir Hassan v. Kang Min* [1992] 2 MLJ 46, the Counsel says, the application must be refused. In reply, the learned Counsel for the defendants submits that the cases cited relate to writ actions whereas the matter before the Court now is by way of originating summons. In a writ action various interlocutory stages precede the setting down of a case for hearing and in between this period the parties would have ample opportunity to scrutinise the pleadings and to consider other available evidence in the meanwhile before making a decision as to whether to file such an application. Therefore, it is proper that if the application is made after the action has been set down for trial, the application must be refused. However, in originating summons cases, there was to be no such protracted procedures to follow. On 21 July 1994 the plaintiff was given leave to amend his originating summons. In the amended summons the 2nd defendant's

appointment as the Chief Minister of Sabah was being challenged as well. Because of this substantial change in the character of the action of the plaintiff, further instructions from the 2nd defendant was to be obtained. In the meanwhile the new hearing date had been fixed for 25 July 1994. So, after getting the necessary instructions, this application was immediately sent for filing *vide* letter dated 7 September 1994. So he prays that the fixing of the date of hearing of the originating summons of the plaintiff in this case should not be a hindrance in the circumstances and the two cases cited above should be distinguished.

In this case, the trial of the plaintiff's originating summons was originally fixed for hearing on 5 July 1994. However on that day the plaintiff applied for an adjournment. The defendants strenuously objected to the application on the ground that they have made all necessary preparations to proceed with the hearing on that day and blamed the plaintiff who had filed the action and not being ready to proceed with the hearing and had asked for costs to be given to them in the event that the Court granted the plaintiff's application for an adjournment. The Court granted the adjournment with costs to the defendants. The Court then fixed new hearing dates on 25 and 26 July 1994. On 25 July 1994 the plaintiff again applied for a short adjournment as the leading Counsel had a technical problem over the issue of a work permit to him. The defendants had no objection to the application this time and at the same time applied for an adjournment of the hearing on the ground that they had just been served with an amended originating summons. Because of the serious implications of the amendment, fresh instructions from the 2nd defendant was to be sought as to the next course of action to be taken. The Court then allowed the adjournment and put the next hearing dates to this session i.e. 27 and 28 September 1994. In the meanwhile, by a letter dated 7 September, the defendants filed this application to strike out the pleading of the plaintiff. The Court fixed the hearing of this application on the same date of the scheduled hearing of the plaintiff's originating summons i.e. on 27 of September 1994. I am inclined in the circumstances to agree with the submission of the learned Counsel for the defendants. In regard to a writ action the position is clear that notwithstanding the provisions of O. 18 r. 19(1), which allows an application to strike out the pleading be made at any stage of the proceedings, yet by authority such an application must be refused after the action has been set down for trial: see *Bank Bumiputra's* case *(supra).* However, in the case of originating summons procedure, with a minimum of 4 clear days notice after an appointment for the attendance of the parties is made a date can be fixed requiring the parties to appear for the hearing. Therefore, if the rigid rule applicable to a writ action is to be applied, very seldom can an application of this nature be filed. In this case, the originating summons of the plaintiff was filed on 20 May 1994 and the memorandum of appearance of the 1st to the 9th defendants was entered on 10 June 1994. The notice of appointment to hear originating summons in this case was sealed towards the end of June 1994 and the Court fixed the date of hearing to be on 6 and 7 July 1994. Thus if the rule in *Bank Bumiputra's* case *(supra)* is to be applied, there would not be any room for the defendants to file this application. Furthermore, in this case, the matter is aggravated by the substantial amendment made to the originating summons on 21 July 1994 and therefore, instructions from the 2nd defendant was to be obtained. In the circumstances, I would hold that the filing of this application by the defendants on 9 September 1994 after the date for the hearing of the action was fixed, is not fatal to them.

Coming now to the application of the defendants. One and a half days were spent hearing the submissions from both sides mainly from the learned Counsel for the defendants. The Counsel for the 3rd defendant adopts the submissions of En. Ghani. The submission by En. Ghani is mainly on the issue of the jurisdiction of the Court to hear the originating summons of the plaintiff it being in respect of matters which are non-justiciable. He cited various Indian authorities in support. However, he conceded that those matters concern relevant provisions as contained in the Indian Constitution which generally are not in *pari materia* with the provisions as contained in the Sabah State Constitution.

It is accepted that when anyone is given the absolute discretion to decide upon certain matters, it is not the function of the Court to inquire as to how the person exercises his discretion on the matters and the factors he took into consideration in exercising such a discretion. See *Tun Datu Haji Mustapha bin Datu Harun v. Tun Datuk Haji Mohamed Adnan Robert (No. 2)* [1986] 2 MLJ 420. The subjective determination of the person is non-justiciable. However, considering the matters contained in this application of the plaintiff as a whole, those matters involved various aspects not all of which are concerning the issue of questioning the exercise of the discretion of the Yang di-Pertua Negeri Sabah given by the State Constitution. Therefore, it is not correct for the Court to decline to hear the originating summons wholly on the ground of lack of jurisdiction. Before any such discretion is to be exercised by the person so given, if the statute or the Constitution imposes conditions to be satisfied before the exercise of such discretion, only the fulfilling of those conditions would clothe the person given the jurisdiction to exercise the discretion. The Court, therefore, will not be without jurisdiction to consider whether the requisite conditions are being fulfilled by the person. Once these conditions are satisfied, then the Court will not any longer be having jurisdiction to enquire as to how and what factors that person took into consideration in arriving at his decision. A good example is in regard to the provisions as contained in Article 7 of the Constitution. It is as follows:

> 7(1) If the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, then, unless at his request the Yang di-Pertua Negeri dissolves the Assembly, the Chief Minister shall tender the resignation of the members of the Cabinet.
>
> (2) A member of the Cabinet may at any time resign his office by writing under his hand addressed to the Yang di-Pertua Negeri, and a member of the Cabinet other than the Chief Minister shall vacate his office if his appointment thereto is revoked by the Yang di-Pertua Negeri acting in accordance with the advice of the Chief Minister.
>
> (3) Subject to clauses (1) and (2), a member of the Cabinet other than the Chief Minister shall hold office at the pleasure of the Yang di-Pertua Negeri.

Under clause (1), if the Chief Minister requests the Yang di-Pertua Negeri to dissolve the Assembly but the Yang di-Pertua Negeri refuses to accede to the request, the Court cannot question the Yang di-Pertua Negeri as to why he refuses or as to what matters he took into consideration in refusing the request. This is so, because the power to withhold the consent to a request for the dissolution of the Legislative Assembly is exclusively given by the Constitution to the Yang di-Pertua Negeri pursuant to Article 10(2)(b) of the Constitution. Under clause (2) of Article 7, the Yang di-Pertua Negeri is being given the power to revoke the appointment of a member of the Cabinet other than the Chief Minister. If a member other than the Chief Minister has his appointment

revoked by the Yang di-Pertua Negeri and he asks the Court to decide the issue of the revocation alleging that it was not done in accordance with the provisions of the Constitution, the Court has the jurisdiction to enquire whether the condition required by the clause of the Article of the Constitution is being complied with. However, once the Court is satisfied that the condition precedent has been fulfilled, the Court has no further jurisdiction to inquire as to why the Yang di-Pertua Negeri revoked the appointment of the member. The condition precedent here is that to revoke the members' appointment the Yang di-Pertua Negeri must act in accordance with the advice of the Chief Minister. Under clause (3) a member of the Cabinet other than the Chief Minister shall hold office at the pleasure of the Yang di-Pertua Negeri but subject to certain conditions to be fulfilled, and not a pleasure at large. So in this instance the Court has the jurisdiction to enquire whether in exercising his discretion under the clause, the Yang di-Pertua Negeri has overlooked the condition precedent required by the clause. So, just that the Yang di-Pertua Negeri has a certain discretion to exercise, it does not mean that *ipso facto* the jurisdiction of the Court is ousted. While on the subject of the pleasure of the Yang di-Pertua Negeri, the learned SFC cited various Indian authorities that Ministers hold office at the pleasure of the Governor. One such authority is *Mahabir Prasad v. Prafulla Chandra* AIR 1969 Calcutta 198. At page 209, the learned Judge said:

> Article 164(1) provides that the Ministers shall hold office during the pleasure of the Governor. This exercise of pleasure by the Governor, however, has not been fettered by any condition or restriction. The withdrawal of the pleasure by the Governor is, in my view, a matter entirely in the discretion of the Governor. The provision in clause (2) of Article 164, that the Ministers shall be collectively responsible to the Legislative Assembly of the State, does not in any manner fetter or restrict the Governor's power to withdraw the pleasure during which the Ministers hold office.

Such being the case, the learned SFC says, by the 1st defendant appointing the 2nd defendant and on his advice appointing the 3rd to the 9th defendant based on his discretion, the 1st defendant was in fact withdrawing his pleasure upon the plaintiff. Hence the plaintiff cannot complain for his loss of office, and the Court has no jurisdiction to question the 1st defendant in withdrawing his pleasure. Therefore, the issue is non-justiciable. The sole judge is the 1st defendant and not the Court. With respect, Article 164(1) of the Indian Constitution is not in *pari materia* with Article 7(3) of the Sabah Constitution. Article 164(1) thereof states that the Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, **and the Ministers shall hold office during the pleasure of the Governor.** Whereas, Article 7(3) states that **subject to clauses (1) and (2)** a member of the Cabinet other than the Chief Minister shall hold office at the pleasure of the Yang di-Pertua Negeri. (Emphasis is mine). So, the exercise of pleasure by the Yang di-Pertua Negeri upon the Ministers is fettered with conditions and restrictions. So, the Court has the jurisdiction to enquire, if the 1st defendant has so exercised his discretion upon the plaintiff in this case, whether he had done so subject to the fulfilment of the conditions in clauses (1) and (2) of the Article. Under clause (1), the discretion is properly exercised to withdraw his pleasure if the Chief Minister ceases to command the confidence of a majority of the members of the Assembly and he tenders the resignation of the members of the Cabinet to the 1st defendant but the plaintiff refuses to vacate his office. Under clause (2), the discretion is properly exercised if the plaintiff's appointment

is revoked by the 1st defendant acting in accordance with the advice of the Chief Minister, but the plaintiff refuses to vacate his office. In this case what we have is the fact that the Chief Minister resigned and the plaintiff's appointment is never revoked by the 1st defendant. So, the issue revolves around the interpretation to be given by the Court to the various relevant provisions of the Sabah Constitution, particularly Articles 6 and 7 thereof, which is clearly within the jurisdiction of the Court. Therefore, the matter is not that plain and obvious to invoke the discretion of the Court to strike out the plaintiff's originating summons summarily.

The learned SFC further submitted that Pairin resigned pursuant to Article 7(1) of the Constitution. That is his version but the plaintiff contends otherwise. Under ground (a) of O. 18 r. 19(1) of the RHC, what is before the Court is only the originating summons of the plaintiff and his affidavit in support. In the affidavit the plaintiff merely says that on 17 March 1994 Pairin resigned as Chief Minister and on the same day the 1st defendant appointed the 2nd defendant to replace him and on 24 March 1994 on the advice of the 2nd defendant, the 1st defendant appointed the 3rd to the 9th defendants as Ministers and members of 2nd defendant's Cabinet based on the petition by 30 Assemblymen. By his prayer, the plaintiff seeks *inter alia,* for a declaration that the resignation of Pairin was under Article 7(2) of the Constitution and not under clause (1) thereof. There is an issue to be tried here because if the resignation is in accordance with clause (1) the plaintiff cannot complain. It is under clause (1), if it is established that Pairin resigned on account of his ceasing to command the confidence of a majority. According to the plaintiff, this is to be resolved only by a motion tabled in the Assembly. The learned SFC says Pairin cannot resign under clause (2) of the Article as that clause is meant only for the members and not for the Chief Minister. I cannot agree with the SFC because the language of the clause is clear that it includes a Chief Minister as a member of the Cabinet when dealing with resignation. The clause only excludes the Chief Minister in the case of revocation of the appointment by the Yang di-Pertua Negeri. So again this is not a plain and obvious case for a striking out summarily of the plaintiff's originating summons.

It is also said that the resignation of Pairin must be deemed to be the resignation of the Cabinet based on established constitutional convention. Convention comes in aid of the construction and interpretation of the constitutional provisions. However, convention cannot override the express provisions of the constitution. So before a convention is invoked, the constitutional provision needs to be looked at. So the matter is not plain and simple by merely looking at the convention and brushing aside the constitutional provision. It is further submitted that the appointment of the 3rd to the 9th defendants as Ministers means in law and in fact the dismissal of the plaintiff as a Minister. Again, this involves the argument as to the interpretation to be given to Article 7 of the Constitution as to whether in the absence of the resignation by members of the Cabinet and in the absence of revocation of their appointments, and in the absence of a clear reason for Pairin to resign, the said resignation is one under Article 7(1) thereof. If the resignation of Pairin as Chief Minister was under clause (2) we cannot conclude that such resignation would result in the automatic loss of office of the members of his Cabinet simply on account of the appointment of the 3rd to the 9th defendants into the Cabinet of the 2nd defendant. Again, this is an issue of law to be resolved at the trial.

In conclusion, I hold that looking at the pleading of the plaintiff there are various issues to be tried and in the circumstances the application of the defendants under ground (a) of O. 18 r. 19(1) must necessary fail. On grounds (b) and (d) and the inherent jurisdiction of the Court, the Court in this proceeding is allowed to look at the evidence found in the various affidavits filed by both sides. Under this head, the Court will strike out the originating summons of the plaintiff if satisfied that it is scandalous, frivolous or vexatious or that it is an abuse of the process of the Court. Exh. SS-2 to the affidavit in reply No. 1 affirmed by Shee Hoa Sern on behalf of the all the defendants is a letter of resignation dated 17 March 1994 from Pairin addressed to the 1st defendant. Below is the contents of the letter:

17 Mach 1994

Tuan Yang Terutama
Yang DiPertua Negeri Sabah
Istana
Kota Kinabalu

Kehadapan Majlis Tuan Yang Terutama
Yang DiPertua Negeri Sabah.

Per: Perletakan Jawatan Sebagai Ketua Menteri Sabah

Dengan segala hormat dan takzimnya, izinkanlah saya menyampaikan hasrat dan tujuan saya meletakkan jawatan sebagai Ketua Menteri Negeri Sabah mulai dari jam 2.00 petang 17 Mach 1994.

Saya juga ingin mengucapkan setinggi-tinggi penghargaan di atas kepercayaan Tuan Yang Terutama Yang DiPertua Negeri Sabah kepada saya sebagai Ketua Menteri Negeri Sabah selama ini.

Sekian, terima kasih.

Yang benar,

t.t.....
(Datuk Joseph Pairin Kitingan)

According to the 1st defendant in the affidavit in reply No. 4 of the defendants, on 17 March 1994 Pairin by a letter addressed to him tendered his resignation. The letter is exhibited as TYT-5 which is also SS-2. In the exercise of his personal discretion under Article 7(1) of the Constitution, he accepted the resignation as Pairin had ceased to command the confidence of the majority of the Assembly. It might be so in his mind because in an earlier paragraph he said on 16 March 1994 a petition signed by 30 members of the Assembly was formally delivered to his office. However, it is to be noted that from the content of the letter the resignation is in respect of Pairin as the Chief Minister. It is not a letter tendering the resignation of the members of his Cabinet as provided for under Article 7(1) of the Constitution. The Constitution uses the phrase "to command the confidence of a majority of the members of" the Assembly both in Articles 6 and 7 of the Constitution. One is in the context of the judgment of the Yang di-Pertua Negeri in appointing a Chief Minister and the other is in the context of a Chief Minister if he ceases to command the confidence of a majority, he is to tender the resignation of the members of his Cabinet. As regard the first, it is non-justiciable if circumstances under clause (3) of Article 6 warrants it. But in relation to the second, in the light of the

contents of the resignation letter, it is arguable and becomes an issue in the context of Article 7 of the Constitution. To my mind, there is a triable issue as to how the fact of "ceases to command the confidence of a majority" is to be determined. There is the press statement issued by Pairin on 17 March 1994 itself exhibited as SS-3. But that is what Pairin says after tendering his letter of resignation to the 1st defendant. In law, subject to certain exceptions, a written statement cannot be allowed to be varied or contradicted by an oral or other written statement. So to that extent it cannot be said that the originating summons of the plaintiff is scandalous, frivolous or vexatious or is an abuse of the process of Court. Then the learned SFC says that the plaintiff lacks *bona fide* because he was present when Pairin made the press statement and he did not maintain that the resignation of Pairin was purely personal to him and did not also maintain that he was still a Minister. This inaction of the plaintiff, says the SFC, amounts to an inequitable conduct on the part of the plaintiff which disentitles him to the declarations sought. I cannot agree because in the circumstances of this case, it is not so much of what the plaintiff did or did not do. It is more of oral evidence against a written one. Lastly, there is also the submission of the learned SFC that the exercise embarked upon by the plaintiff in his application is futile and academic as the new Chief Minister and his Cabinet had been appointed and it will create havoc if an opposition member like the plaintiff is put in the Cabinet of the 2nd defendant, and on that ground the action should be struck out. I think it is premature at this stage of the proceeding to consider all that. An action for a declaration involves two stages. The first is that the plaintiff must persuade the Court that he has the right. If he succeeds, only then will the second stage come into operation, i.e. the remedy stage. By his submission, the learned SFC was saying that the plaintiff should not be given the remedy to avoid repercussions. However, at the moment we are not even at the first stage as yet as this application of the defendants to strike out the pleading of the plaintiff constitutes a preliminary objection to the proceedings.

In the circumstances of what has been said above, it is in my considered opinion that the originating summons of the plaintiff has raised several issues both of law and facts which calls for a full trial of the action. It is not a plain and obvious case where upon the Court ought to strike out the pleadings summarily. I find that the plaintiff has a reasonable cause of action on the pleading and that it is in no way scandalous, frivolous, or vexatious or otherwise an abuse of the process of the Court. In the circumstances, I dismiss the application of the defendants by this summons in chambers with costs to the plaintiff. The hearing of the originating summons will proceed. Application dismissed with costs.